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ABSTRACT

This issue of "Policy Notes" concerns the restructuring of American education during the past quarter-century, with centralization and legalization being the two most noteworthy changes in educational governance. David Kirp claims that the increased control of schooling by state and federal authorities, the elaboration of new administrative structures, and the greater power of educational professionals have generated conflict that increasingly has been resolved through the courts and other legal means. David Tyack traces the historical development of the American educational system. The legitimating effect of legalization on the state is viewed from an international perspective by Hans Weiler and June Yamashita. Deborah Rhode provides a lawyer's perspective on class action suits. John Meyer and Nancy Stone discuss decentralized national educational authority and the national scope of educational issues as two characteristics of the American educational system that generate legalization. In "Policy Perspectives," Donald N. Jensen analyzes education cases in California that were decided between 1858 and 1980 according to the number of cases decided, the issues they raised, and the type of plaintiff who brought the suit. (Author/MLF)

READING, WRITING AND RIGHTS
Shaping School Policy Through Law

During the past quarter-century, the governance of American schools has been transformed, even remade. Local control of school policy was a historic watchword and that control was essentially political and professional, not legal, in character. Within local communities, dominance over decisionmaking was uneasily shared by lay boards of education and educational professionals. Tussles over the distinction between questions of policy, the province of the governing board, and questions of practice, properly the terrain of the educators, were frequent events. State departments of education generally did little more than distribute aid according to a legislatively specified formula and provide modest technical assistance.

Centralization and legalization mark the two most noteworthy changes in this system of governance. The Supreme Court's 1954 decision in *Brown v. Board of Education* underlies both changes and puts the courts centrally in the educational policy business. Racial inequalities lay at the heart of the Court's concern, but the justices' opinion reached beyond race, potentially enveloping all questions of equity in public schooling within the judicial net. The Court in *Brown* spoke of the provision of education as the most critical function of state and local government, and wondered aloud whether any child deprived of adequate schooling could hope to succeed in life. This judicial language opened the door to a host of other right-seekers. The handicapped, the non-English speaking, those living in poor school districts, and female students all saw in *Brown* the opportunity to convert the unfairness they suffered at the hands of school systems dominated by local and insular concerns into constitutional wrongs. They took advantage of that opportunity by flooding the courts with lawsuits.

The elaboration of substantive rights, for example the requirement that school districts provide their handicapped children with an appropriate education, is a key element of legalization; the development of procedural protection — the right to challenge the appropriateness of the special education received — provides another element.

Like other government services, schooling was regarded as a privilege, not a right and so could be denied at the discretion of responsible public officials. But in a series of decisions during the 1960s concerning welfare and public employment, the Supreme Court eroded the distinction between rights and privileges. The extension of procedural protection to education was an obvious next step, one taken by the lower courts in the 1960s and subsequently affirmed by the Supreme Court. And although proceduralism was originally regarded as the remedy for abuses of official authority, it also became part of the arsenal of those seeking substantive rights.

One reason the federal government asserted greater authority over schooling was to turn the aspirations of the *Brown* decision into a functioning reality, since the judiciary on its own could not impose its understanding of racial justice on recalcitrant Southern school districts. Beginning with the passage of the Civil Rights Act in 1964, the extent of federal intervention into the racial practices of Southern school districts was substantial. But the federal government did not assume increased responsibility for education only to rid public schools of the taint of racism.

The national government was strongly committed to education as "the answer to all national problems," particularly those problems having to do with the educational failure of poor children, and sought a significant role in shaping educational policy. Beginning in the mid-1960s, the poor and educationally disadvantaged, the handicapped, the limited-English-speaking and other traditional have-not groups became a national interest. From less than a half-billion dollars in 1960, the federal education budget allocated to elementary and secondary education grew to $7 billion in two decades. A parallel expansion also occurred at the state level.

Just as the quarter-century since *Brown* marked a revolution in modes of educational governance, the 1980s are witnessing a counterrevolution in full swing. The increase in legalization has slowed perceptibly. The Supreme Court has not extended the reach of *Brown* to recognize a new generation of would-be holders of rights, but instead has sought to rein in the scope of that opinion. The Court has upheld against constitutional attack a state school financing system which resulted in wide inequities among districts; the justices severely constrained the possibility of consolidating city and suburban districts to overcome segregation; and the Court narrowly construed the Education for All Handicapped Children Act, preserving the authority of states to institutionalize handicapped youngsters. While federal district courts have continued to recast school district policies in an attempt to undo the effects of segregation, Congress in 1981 mounted a serious challenge to the judiciary's authority in this realm by threatening to restrict the power of federal courts in desegregation suits.

In the schools as well as in the courts, challenges to legalization have been heard. Some argue that imposing procedural requirements on disciplinary practice potentially undermines the fragile authority of those who teach and administer in the schools. The due process entitlements of handicapped youngsters are scored as too expensive, subject to abuse by well-to-do parents seeking a private education at public expense, and a source of tension between parents and teachers who should instead work in tandem on behalf of the child. Critics of legalization also ask whether rights-mindedness and rule-mindedness have gone too far. They wonder if the public school system has been impaired by the loss of legitimacy that attends the denial of authority to legislatures and bureaucracies and denial of respect to professional judgment.

The appeal of legalization in the context of education is easy to understand. Education has historically been treated as a national religion, the promised panacea for all social ills. Blacks, the poor and immigrants have been particularly faithful parishioners, for education is seen as representing the royal road to economic security and inclusion in the political order. Yet the repeated failure of education to make good on this promise breeds frustration; persisting inequality grows less and less acceptable. The institutions of schooling are themselves both visible, and hence handy targets, and vulnerable. The technology of education is weak; the boundaries of educational organizations are loose and poorly defended; the system of school governance is tractious and fragile. Seeking vindication through law thus comes to appear terribly important and readily attainable.

The promise of legalization is great. It betokens a principled enterprise, in which economic or political power count for far less than in other arenas. It also includes normative judgments about how to achieve a just society — embodied in the Fourteenth Amendment's commands to equal protection and procedural fairness. The idea of rights recognizes the fundamental claims of persons to equal concern and respect, offsetting the utilitarian tendency to balance political interests and preferences. That legal institutions explain their decisions in terms of public values offers to citizens the means to participate in decisions that affect them. This public colloquy serves as a basis for review of decisions, and hence as a check on arbitrary official action.

At a time when critics of legalization are more vociferous than defenders, it bears remarking that the promise of legalization has been largely fulfilled. The history of America and the public schools may be told as the progressive realization of the democratic ideals of fairness and equality. But when rules become ends in themselves, cut loose from the principled considerations that were their initial impetus, legalization degenerates into legalism. The language of rights camouflages what are better phrased as political claims. The very idea of rights loses value when the mantle of law protects those whose injuries are slight or speculative. The process of legal reasoning sometimes fails to shed light on the task of organizational redesign, an essential element of suits involving institutional reform. Hearings themselves may merely harden antagonisms without usefully resolving disputes.

In an area subject to legalization, such as education, both the strengths and the debilities of the phenomenom are evident: how might things be otherwise, given the inherently problematic nature of changing the ways public institutions do business? The useful policy question is not whether legalization is perfect but whether it represents a relative good, which on balance promotes openness of process, fairness and efficiency of outcome. ■

Bibles, Booze and Bilingualism

In the last generation there has been much writing about the litigiousness of American society, and legal activism in public education has drawn fire from critics. Yet it is often forgotten that law has always been an important instrument in shaping public schooling as well as a mirror of its goals, structures and processes. Not all groups have had equal access to legislatures or courts, of course, nor have all conflicts been defined as legal ones. Particularly in times of social stress and structural transformation, people often employ the law to create a real or imaginary continuity with the past which may camouflage — intentionally or unintentionally — what is really happening. Uproar over recent litigiousness may signal, in part, concern over new and hitherto powerless actors gaining new influence.

During most of our history public education has been one of the few domains in which conflict has been regarded as unfortunate if not irrational. Consensus has been the ideological norm, based first on shared political and religious values and later on professional expertise. There has been little effort to create a rationale for controlled conflict in an institution that was supposed to be beyond controversy. However, in the last generation deeply-based conflicts that had been papered over by apparent consensus have erupted in a society marked by important divisions of class, race, religion, gender and ethnicity.

Consensus and Conflict in the Common School Crusade

During the early nineteenth century Americans were committed to education, but their schools were a miscellany of institutions, often divided on the basis of class, gender, religion and ethnicity. The common school crusaders of that time sought to attract all to public schools —

briefly . . .

The increased control of schooling by state and federal authorities, the expansion of government influence over classroom curricula, the elaboration of new administrative structures and the greater power of educational professionals have generated conflict that increasingly has been resolved through the courts and other legal means. Donald N. Jensen, consulting editor for this issue of *Policy Notes*, has brought together only a few of the many articles on legalization that are the result of IFG's research program on Law and Education. A research associate at IFG, Jensen works closely with the director of that research effort, David Kirp, a professor at the Graduate School of Public Policy, University of California at Berkeley. Kirp wrote the introductory article, "Reading, Writing and Rights".

David Tyack, a professor in the School of Education at Stanford University, participated in the Law and Education Seminar, a meeting of individuals from many academic fields and institutions conducted biweekly for more than two years. "Bibles, Booze and Bilingualism" is taken from a paper he presented at that seminar. The legitimating effect of legalization on the state is viewed from an international perspective in "Rules and Schools Abroad". This article was contributed by Hans Weiler and June Yamashita. Weiler is the program coordinator for IFG's research program on Legitimacy and Education, which is supported by the Spencer Foundation. He is also a professor in the School of Education at Stanford University where Yamashita is a doctoral candidate.

A lawyer's perspective on class action suits is provided by Deborah Rhode in "For Whom Do Lawyers Speak?" She is a professor at the Stanford University School of Law and presented a full paper on the subject to the Law and Education Seminar. "Order and Disorder in Education: When Does Legalization Occur?" was written by John Meyer and Nancy Stone, editor of *Policy Notes*. John Meyer is a professor in Stanford's Department of Sociology, and the article is based on his research for IFG's Law and Education research program.

Donald N. Jensen provided the illustration that appears on the first page. ■

rich and poor, native-born and immigrant, male and female, and people of different religious persuasions. They had few powers of coercion in most states and communities and relied instead on mobilizing a social movement that drew in its methods, ideology and membership on the example of the expansionist Protestant churches of the period. What public school promoters sought to achieve was a general commitment to a common institution, free to all, financed and governed by the public, and expressing a common denominator of moral and civic values.

A large number of the common school leaders believed, quite literally, that the United States was God's country, an affirmation declared on the back of the United States seal and echoed again and again in sermons and political speeches. Over and over again they declared that intelligence and virtue were necessary for the stability of republican government and the preservation of the rights and liberties of the people, that political wisdom, morality, and religion were inextricable. Often state constitutions or statutes specified the virtues the schools should inculcate in the young, a mix that Benjamin Franklin, William McGuffey, and the Boy Scout Oath have rendered familiar: patriotism, order, temperance, piety, kindness, chastity, cleanliness, industry and honor, among others.

Although moral exhortation was the main form of persuasion, laws established a framework for creating, governing, and financing local school districts, or ratified them where they existed already. In an era when states had weak or non-existent machinery for actually enforcing the laws, much depended on local initiative. School laws provided a blueprint to the local citizens for a uniform system of common schools: free, universal, public in support and unconstrained by sectarian and politically partisan influence.

Conflicts clearly did arise over public schools all across the nation, despite the reformers' desire to base public education upon consensus. But relatively few of these conflicts ended up in court. What is more striking than conflict in the mid-nineteenth century public school is the relative agreement that did prevail in most communities. People accustomed to competing in religion, in party politics, and in economic life found enough common ground of values and interests to build together a common school system.

The Quest for Normative Dominance

Towards the end of the nineteenth century and during the Progressive era, however, certain ethnocultural groups decided that they should enforce their values in public education through legislation. Americans who believed that the United States was not only God's country, but also *their* nation — mostly native-born Anglo-Saxon citizens of pietist Protestant persuasion and respectable station — decided that their preferred future required the force of state sanction. They feared that they could no longer rely on voluntary action or on unself-conscious consensus to preserve their republican vision.

Religion was a major arena of ethnocultural conflict in education. Most disputes that arose during this time were fought out in local communities without recourse to the courts or legislatures; indeed, sometimes they led to pitched battles in the streets between Protestants and Catholics. When contestants in local communities did take religious issues to court — generally over the use of the Bible — the decisions usually favored majority rule over individual rights of conscience.

Impelled by a certainty about public evils and the need for educational solutions, private groups pressed for mandatory moral and civic instruction. These state laws reflected concern for national unity inspired by wars and worries about radicalism and the assimilation of immigrants. A major vehicle for inculcating patriotism was United States history, a course of study required in 30 states by 1903. The American Bar Association lobbied so successfully to require teaching about the American constitution that by 1923 twenty-three states prescribed the subject. The Women's Christian Temperance Union lobbied effectively for state laws and a federal law requiring instruction about the evils of alcohol. By 1903 all states and territories required such instruction, often misleading indoctrination, about alcohol.

Another important kind of state legislation concerned language policy, especially compulsory instruction in English. Previously, such decisions were customarily left to local communities. When states like Wisconsin and Illinois passed laws in 1889 outlawing instruction in foreign languages, immigrant groups reacted strongly at the ballot box and overturned the legislation. Nonetheless, by 1903 fourteen states required public elementary schools to teach only in English, a number that swelled to 34 by 1923.

Codification of the One Best System

Statutory and administrative law was one major means of educational reform employed by professional leaders in public education beginning with the Progressive era. More than any other group, these reformers transformed the character of public education during the twentieth century, often in alliance with business and professional elites. They sought to abolish the older decentralized mode of school governance and put in its place a more centralized system in which lay

boards deferred to professionals. They believed that educators were not just another interest group but experts who uniquely understood and served the public good.

The new educational leaders, mostly university education professors and deans, leading city and state superintendents, and foundation executives, were typically from small-town pietist backgrounds and uncritically accepted white, Anglo-Saxon, Protestant cultural values. These professional leaders wanted to use state legislation not so much to prescribe virtue — as did the advocates of normative dominance — as to codify and enforce their version of a new standardized and expanded educational system. Indeed, codification was to place the school beyond the reach of special interest groups, small-minded rural legislators, and machine politicians.

Both statutory and administrative laws were used to accomplish this good. By 1925 thirty-four states reported that they had standardized 40,000 local schools. No detail was unimportant to quality for state funds. Score cards were created for country schools that rated them on their window shades, the color scheme of floors, the presence of globes and dictionaries, sanitary drinking cups, and the quality of toilets.

As state laws extended their scope and state and local bureaucracies grew more efficient, popular paticipation in educational decisionmaking declined, giving local administrators greater autonomy in making regulations and exercising professional judgment. The courts loomed larger as a means of redressing the grievances of lay people than it had in the past.

In the nineteenth century the courts typically sought to uphold the dignity of the lone teacher confronting the rural community. In the first half of the twentieth century, judges largely ratified the centralization of authority in increasingly bureaucratic structures of schooling. Parents usually lost when they challenged compulsory attendance, new curricular or health requirements, harsh discipline, and seemingly arbitrary regulations controlling pupils or the course of studies. The child was indeed becoming legally more the creature of the state than of the parents.

Challenges to Business as Usual

In the early 1950s, there was less litigiousness than today, fewer and less complex federal and state regulations, and more acceptance of the authority of educational officials. When protest groups traditionally lacking power pressed their demands for basic social change, they tended to appeal not to local power wielders but rather to outside agencies for redress: to the courts, to state and federal legislatures, and to prosperous liberals in the churches, foundations, and national voluntary groups like the NAACP. One social movement after another mobilized members and broad public support for social change in the 1960s and early 1970s. Federal and state legislatures passed landmark statutes like the Civil Rights Acts, Title I of the Elementary and Secondary Education Act (ESEA), and laws on multicultural education, bilingual instruction, and the handicapped. The gains were both symbolic and tangible. Ethnic groups sought equality of dignity, a legitimation denied by earlier attempts to define American values in a culturally exclusive manner. In effect, symbolic legislation about multiethnic curricula declared that pluralism in culture was also American.

For their part, school officials have had mixed reactions toward the new legal activism. Not surprisingly, they have often been bothered by the decline in judicial deference toward school authorities. Accustomed to dealing with local elites in the 1950s, school superintendents found themselves confronted in the 1960s with angry minorities and other aggrieved groups who took to the courts to gain equality.

But educators also have been historically committed to certain visions of equality. In the nineteenth century reformers conceived of equality mostly as free and open access to public schools. The administrative progressives added a new and complicated dimension — equality of opportunity — while believing themselves the best judges of how to achieve that goal. Many of the court decisions and legislative reforms of the last generation can be understood within those two traditional concepts of equality. One could argue that what groups like blacks, or the handicapped, or women really wanted was equality of access and equality of opportunity — in short, to have public education fulfill the promise of the *common* school. Educators could deny that goal only by denying their own best ethical heritage. ■

Rules and Schools Abroad

Analysts of the politics of advanced industrial societies are increasingly questioning the viability and credibility of existing systems of parliamentary representation. Assessments of the "legitimacy crisis" of the modern state vary widely, but the sense of powerlessness of individuals and groups in society in relation to an all-powerful and non-representational government bureucracy looms large in most of them. The system itself is currently being challenged in many Western societies by the spectacular growth of extra-parliamentary forms of political expression and aggregation, notably in the form of citizens initiating legal action. This challenge of "the new politics outside" has acquired considerable political significance in most Western democracies, and appears to be both a symptom of the decline of traditional parliamentary representation and a means to restore credible and legitimate avenues for the articulation and aggregation of social interests.

Courts and legislatures in both West Germany and the United States have invaded territory which used to be the largely uncontested domain of school administrators in German state ministries of education and in American local school district offices. The educational issues affected by this process have encompassed, in both countries, a wide variety of questions, ranging all the way from matters of discipline to the determination of educational objectives and from teacher tenure to equity in access and resource allocation.

In both America and West Germany, courts have demonstrated a capacity to make legislative institutions do things they don't seem to be able to do on their own political momentum. In both cases, the courts' decisions have resulted in considerable legislative activity: towards greater equity in school finance and more adequate provision for the education of handicapped children in the United States and towards court-stipulated procedural standards for curriculum development, school organization, and disciplinary action in the Federal Republic.

West Germany

The West German case suggests an important distinction between two different meanings of legalization: in its broader sense, legalization refers to the increasing importance of legislative or judicial interventions in educational policy and practice. In this sense, the judiciary participates in the process of creating and developing legal norms. The process of legalization in West German education, in this broader sense, has been remarkably similar to what has gone on in the U.S.A., even though the legal traditions, the institutional arrangements for judicial and legislative pro-

cesses, and the political context produced some modest variations.

In a second, narrower sense, legalization means that certain kinds of educational decisions are sufficiently relevant to constitutional considerations to require formal statutory enactment by legislatures and not just administrative decisions from within the executive branch of government. The West German constitution itself does not specify any constitutional provisions for education, with the exception of specifying the state's general supervisory authority over the educational system, the question of religious instruction, and the right to establish private schools. One of the most important elements in the first phase of legalization of education in Germany thus has been the enactment of rather specific legal norms directly derived from constitutional provisions which had not originally been designed with educational applications in mind. While this effort temporarily filled the void of statutory provisions, it was also bound to raise the question of the legitimacy of the norms under which educational policy was made and how conflicts over its implementation were to be adjudicated. In this situation, the Federal Constitutional Court played a particularly critical role.

The Federal Constitutional Court

The West German Federal Constitutional Court was conceived and created by the founders of the post-World War II Federal Republic in 1948-49. At that time, the reorganization of judicial review was a high priority of the framers of the new constitution. The Federal Constitutional Court was created as a supreme body independent of the hierarchy of regular courts or the system of courts for special jurisdictions (labor, fiscal, administrative, etc.), and vested with the function of judicial review.

For the field of education, the relative dearth of constitutional and statutory norms during the reconstruction of the German legal system had given rise to the increasingly problematic practice of filling this void either through administrative decisions or through the constitutional interpretation of various lower courts. In this situation, the Court assumed an important directive role in demanding the consolidation of the legal framework for West German education by the legislature.

The most significant educational issue faced by the Court was the relationship and reconciliation of the constitutionally guaranteed right of parents to be primarily responsible for the care and upbringing of children, and the state's supervisory responsibility for the entire educational system. These potentially competing claims are further complicated by the frequent invocation, on behalf of the child, of the basic right to the free development of personality, which sometimes is held to conflict with the state's right to structure public education.

The Court discussed at considerable length the tensions between parents' rights, personality rights of the child, and the educational mandate of the state. Ultimately it affirmed the state's responsibility to determine both the structure and, to a considerable extent, the content of education. In doing so, however, the Court imposed on the state stringent conditions for assuring the legitimacy of its policies in a field as constitutionally and normatively delicate as education. These conditions have to do primarily with equal protection and due process.

Equal Protection and Due Process

In emphasizing the applicability of the twin constitutional principles of equal protection and due process to the realm of public education, the Court affirmed its fundamental opposition to the notion of the "special authority relationship" which was prominent in the tradition of German political and legal theory and practice. Included in this domain of the special authority relationship were civil servants, soldiers, prisoners, and school children. Traditionally within this domain, whatever rights regular citizens enjoyed under the existing legal order did not apply; these "exempt" domains and populations neither required any statutory basis, nor was their legality or constitutionality subject to review by the courts.

The Federal Constitutional Court argued that the 1949 Basic Law abolished the notion of the special authority relationship, and affirmed this interpretation in a number of landmark cases for education. In the Court's view, education, far from being exempt from the legal order, was particularly in need of the clarifying and protective effects of duly enacted legal standards and procedures.

The efforts of the Federal Constitutional Court were thus designated to lead the schools out of the domain of internal administrative rule-making into the open air of duly enacted statutes. Wherever "essential" aspects of education (e.g., educational and curricular objectives, the structure of the educational system, relegation, etc.) were involved, administrative decrees and ordinances would not do, and a formally legislated, statutory basis was required. By 1977, the Court found that this principle had at last been accepted into legal thought about education, even though the question of what is and is not to be considered essential remains a matter of continuing dispute.

Legitimacy

At the same time, the Court became increasingly concerned over what it saw as a major "legitimacy deficit" in the way in which important educational policy decisions were made. This deficit was seen as the result of the non-involvement of elected legislatures in the process of setting educational norms and objectives; a disproportionate share of power had thus accrued to the executive bureaucracy in educational matters. The Court recognized a widely held concern about the credibility and legitimacy of the state's authority in setting and implementing policy in education. It is out of this concern that the Court designed procedures to overcome the absolutist vestiges of the special authority relationship of education, and to recognize the need for added legitimacy in the educational policy process.

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There seems to be at least one important difference in the impact the courts have had in the two countries. In the U.S., the main thrust of the courts' message to the state's legislative and allocative authorities appears to have been *substantive* in nature: court decisions have tended to affirm or even prescribe particular educational policies in the form of equity standards, guidelines for bilingual education and the like. In contrast, the German courts and especially the Federal Constitutional Court, appear to have been much more reluctant to commit themselves and the ensuing legislative process to any material principles. Instead, the main thrust has been towards mandating a particular *process*, such as making certain kinds of educational issues subject to formal legislative action. Even where substantive principles were involved, as in the case of weighing parents' rights against the state's authority over education, the Court's ruling normally tended to adopt a procedural solution.

Despite the difference between the substantive and procedural orientation, the concerns of the West German Constitutional Court with the legitimacy of the policy process parallels a good deal of debate in this country over the reassertion of congressional power over the practical supremacy of the executive branch. Whatever some of the more specific differences between the two countries may be, there are unmistakable signs of erosion in the fabric of representational systems on both sides of the Atlantic, and one may well wonder whether remedial strategies, even where they are prescribed by such prestigious institutions as constitutional courts, are likely to halt the further erosion. ■

FOR WHOM DO LAWYERS SPEAK?
Conflicts of Interest in Class Action Suits

Over the last quarter century, courts have become an increasingly significant force in shaping educational institutions. The primary procedural device through which this judicial intervention has occurred has been the "class action" suit. In such litigation there is no single aggrieved plaintiff with clearly identifiable views. Rather the court, after a hearing, certifies a class representative to represent a broad constituency of individuals. For example, a small group of parents and children may sue on behalf of all children in a particular school district. Thus, in many class actions, the plaintiff is an aggregation of individuals, often with unstable or conflicting preferences. How to identify and cope with such conflicts remains a matter of considerable dispute and confusion.

State and federal rules governing adjudication generally require that the representative plaintiffs and their counsel will "adequately protect the interests of the class." However, those rules have left most of the fundamental questions unaddressed. Does "interest" mean simply "preference," and if so, how are preferences to be identified, particularly if the class comprises a diffuse and changing constituency of present and future members?

Dissension within a class can arise at any stage of litigation. Those who prefer the certainty of the status quo to the risks of judicial rearrangement will oppose litigation from the outset. Perhaps more common are schisms that develop during settlement negotiations or the remedial phase of litigation. Often when a suit is filed, neither the parties nor their attorneys have focused on issues of relief. The impetus for the suit will be a general consensus that rights have been infringed or needs ignored, rather than a shared conviction about what specifically should be done. However, once it becomes clear that plaintiffs are entitled to some relief, and that there exists a range of legally acceptable remedies, sharp divisions in preferences frequently emerge within the class.

For example, dispute has centered on the relative importance of integration, financial resources, minority control, and ethnic identification in enriching school environments. Constituencies that support integration in principle have disagreed over its value in particular settings where extended bus rides, racial tension, or white flight seem likely consequences of judicial redistricting. So too, class members have divided over the merits of mainstreaming or deinstitutionalizing disabled students.

In settling such disputes within a class, determining majority views makes little sense. Often, the views likely to be expressed in public polls or plebiscites will be unrepresentative, uninformed, or unresponsive to the needs of future class members. The scant empirical evidence available suggests that response rates to written notices and turnouts at public meetings are far too low to provide a reliable sample of class sentiment. Moreover, the complexity and confidentiality of remedial negotiations may preclude conveying enough facts about alternatives to permit informed plaintiff choices. Even when fully informed, eligible voters cannot always adequately represent a class that includes future members. And if, in the final analysis, courts and counsel are unprepared to defer to the results of a plebiscite, there are obvious reasons not to undertake one in any formal fashion.

Yet by the same token, even if their preferences are not conclusive in determining the "class interest," plaintiffs have a justifiable concern in seeing their views put forward on issues of profound personal significance. Indeed, the effectiveness and perceived legitimacy of judicial intervention will often depend on whether the court has adequate access to the full range of plaintiff concerns. A central difficulty with current procedures is that they fail to insure that preferences counter to those of class counsel and the named plaintiffs will receive a hearing. Dissenting constituencies may lack the knowledge, resources or organizational expertise to step forward. And constraints of time and role may inhibit courts from actively inquiring about conflicts that other participants are content to ignore. From a busy trial judge's perspective, more is seldom merrier; additional parties mean additional papers, and often additional problems in reaching consensus. Whatever their formal responsibilities, courts and counsel may feel that the real obligation to monitor conflicts lies elsewhere. Judges assign the reponsibility to attorneys, attorneys to dissenting class members, and so on. As a result, diverging preferences may never fully surface, or emerge only after a decree is entered, when it is most costly to cope with them.

Thus, improving procedures in educational reform litigation will require clearer and earlier focus on issues of representation. Courts should be required to scrutinize more closely the representativeness of views advanced by named plaintiffs and their counsel. Where indications of substantial conflicts are present, some workable standards for admitting divergent views are necessary. To be sure, broad mandates requiring "adequate representation" will always promise more than they deliver. But giving more precise content to those terms should be a high priority among those committed to improving class procedures in educational reform litigation. ■

Order & Disorder in Education: When Does Legalization Occur?

In the established educational system, most changes are made by routine and legal modifications through a chain of command. Administrative structures are constantly adapting the content and structure of education to include new groups, new curricular themes and new problems. Such changes are part of the system's orderly links with its environment. Legalization, for purposes here, refers to the *disorderly* introduction of legal authority into the education system — instances of authority which violate the routinized order and create new rules that are not integrated into the established system.

Legalization is the result of demands made on the educational system when members of the larger community perceive that the needs of students are not being equally met or that not all students have the same educational experience. As confrontations between social rights or interests and educators arise, an authority external to the educational structure intervenes and compels it to special action. Most often the legal system intrudes into the educational one with a court order or, sometimes, the state or federal government requires schools to enact special programs.

Sources of Disorder

As education is formally defined, it appears to be a clear and orderly system. Parents, the community, teachers, administrators, legislators and interest groups of all kinds know its main outlines and share many expectations regarding students. In fact, the educational system is an extraordinarily chaotic domain. Its human resources are highly unpredictable; the technologies of instruction are variable in nature and consequence; and student achievements are unpredictable and uncertain in measurement.

Formal pupil classifications ignore students' substantive characteristics and attend to organizational ones. For example, students are admitted to Algebra II because they "have had" Algebra I, not because they know the academic material; they enter college because they "have graduated" from high school, not by virtue of competencies; they even enter school on the basis of age, rather than maturity or competence. The formal definition of teachers refers to professionalism and credentials but not to their teaching skills. Curriculum organization specifies abstract course sequences and avoids inspection and evaluation of the courses as they are taught in the classroom. The school's administration carefully scrutinizes attendance, credentials, formal program categories and labels, and disregards information on matters of classroom processes and student learning.

All participants in the system sustain a great deal of blindness about educational substance in order to believe in its formal, ideal definition. When any participant examines education more deeply, the disparities between the idealized concept and actual events or processes become apparent. For example, pupils are infinitely variable so any new virtue or handicap may be "discovered" and made the basis for legitimate claims for change. Social definitions that all students passing Algebra I or that all high school graduates are competent can be perceived as untrue. The actual processes of classroom life are highly variable and classroom differences may be perceived, treated as a violation of technical rules and made the basis of a legal claim. The formal educational system is surrounded by many sources of disorder which provide the basis for legalized change.

Sources of Legalization

The special feature of American education in the recent period is the extent to which legalized rather than routine changes are taking place. Two characteristics of the American educational system create conditions that generate legalization: a decentralized national educational authority and the national scope of educational issues or problems. In combination, decentralized authority and an agenda of national educational problems create a system where interventions take the form of specialized rules unintegrated with the rest of the system.

The American system of education is highly decentralized. There are no national curricula or definitions of teachers and very few national accrediting guidelines for schools. It is the individual states which create rules for an integrated school system by specifying categories of pupils and their attendance, certifying teachers, requiring some elements of standard curricula, establishing funding rules and district bases, defining school and classroom space, and accrediting schools. Local school districts have many legitimate powers over pupils, teachers and curricula; and the schools themselves have considerable discretion over their own curricular programs.

Educational issues and disorders vary in their scope. Some are local, as when a group of parents becomes dissatisfied with the educational progress of their children. Others have a national scope, for example, the perceived relation between the school treatment of handicapped or minority students and their low achievement or the attribution of the Sputnik crisis to failures of American engineering training in the 1950s.

Over the past century of public education, educational disorders have become increasingly national in scope. A developed system of higher education and national customs of occupational certification have created pressures for educational standardization at lower levels. Recent decades have seen a wave of concern about citizen rights and equality that stem from the historic issue of racial inequality. A variety of pressures to expand the meaning of equality into more aspects of social life and to enlarge the role of the legal system in protecting the rights of minorities have placed increased demands on the educational system.

The search for redress has forced those who perceive problems and disorders to go beyond the educational authority to external sources such as courts and legislatures. Problems of general inequality such as race, gender, or income have been perceived to be related to unequal socialization and education. Because national disorders cannot be resolved through routine modifications of a decentralized educational system, external authorities have become more entangled with the educational structure.

Central legislative bodies legalize. The U.S. Congress, vested with no general educational responsibility or authority, responds to constituents who make claims on the educational system by defining special rights or creating programs that are not integrated into the regular educational system. Special and unintegrated rules about many minorities, the poor, the pregnant, special vocational training, female students, a few curricula of national interest, and many categories of handicapped or special students have been legislated. Administrative agencies in state and federal governments also legalize. Categorical programs with special rules and definitions for certain problems and groups of students are created, but the new rules and controls bypass the established hierarchy of the educational system. In an American school district of substantial size, there commonly are programs and fundings reflecting 30 or 40 different state and federal programs and agencies. Ironies arise when schools are

required to treat poor and minority children equally but must use specific resources unequally to do so. Schools are to mainstream the handicapped in the schooling process but treat them with special resources.

Courts also legalize. The continued expansion in national action and in civil rights provides many possibilities for individuals to legalize their claims through court action. Both legislatures and courts define new rights but make no coherent provision for them to fit in with the rest of the educational system. There is an ever growing set of citizen rights enforceable through the courts that schools must uphold.

For many decades, local schools and districts responded to disorders with a steady and integrated modification of education. The curriculum was altered; requirements for teacher credentialing were increased; building standards were raised; requirements for attendance were expanded; and rules for pupil classification were changed. There were occasional special programs and requirements, but most of the rules were incorported into educational codes and structures and were funded through general educational funds. The continued emergence of a national educational agenda cannot be integrated in the same way. In the absence of central integration and authority, legalized reponses to disorders simply add burdens to the schools' administrative and instructional roles.

The American process of creating a national agenda without a centralized educational authority has a consequence in addition to that of legalization. It generates sources of continuing disorder in the educational system. Interest groups form and become legitimated outside of the established educational apparatus. These interest groups mobilize constituencies rather than authority within the educational system; they formulate demands in terms of special rights and needs that may not be easily integrated into any existing administrative structure. Educational professionals emerge outside the hierarchy of authority. In other countries, the professional educational elite is built into the national policymaking and administrative systems. In this country, the elite is both unintegrated and unresponsible in a formal way and their work has become that of discovering and verifying disorders.

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As a consequence of increased pressures and unintegrated rules piling onto the educational system, state, district and school administrative staffs have expanded enormously. Administrative work in American schools and districts has greatly increased: functionaries are needed to interpret and oversee the implementation of each of the special rules and mandated programs; proposals must be written for continued funding; specially required data must be collected; reports must be written; and accounts for each program must be maintained separately. Some analysts estimate that each new dollar of federal funds generates an increase in administrative personnel that is nine times greater than that created by a new dollar of local money. Similar expansions of personnel have taken place at the state level. The typical state department of education has a large number of employees whose main work is to monitor and respond to the federal funds, programs and court-conferred rights that make up the legalized system.

Although the American educational system is cumbersome and costly, it focuses the attention of educators on national concerns. A system that maintains an unwieldly list of educational disorders and turns many of them into legalized solutions may actually be more responsive to societal claims than a tidily integrated, centralized administrative structure. In a decentralized context, legalization has enormous symbolic value. The solutions resulting from legalization are ways of defining important new rights and public concerns to the educational establishment. Even if the legalized solutions to racial inequality, for instance, are ineffectively implemented, they mark new public standards which are shared by administrators, teachers and parents. Even if the handicapped legislation is complex beyond belief, it communicates new values and affects the judgments of teachers and administrators. Legalization may be an effective mechanism for changing the educational system substantially as well as symbolically. ■

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NEW PLAINTIFFS, CHANGING ISSUES AND CHALLENGES TO THE STATE

An Educator's Dilemma

By Donald N. Jensen

Much has been written about the extent to which the administration of the public schools has been affected by law and the courts. School superintendents often complain that they must be lawyers to operate school districts because court decisions seem to affect every aspect of their professional lives. They also complain that both state legislatures and state education agencies are exercising ever more control over local educational policy and that there are fewer areas of educational policy now left to local discretion than ever before.

Appellate court decisions involving education in at least one state, California, give empirical support to the sense that the courts are now more important in education. Examination of these cases confirms that the courts have been deciding more education cases in the past few years and that these cases are likely to involve educational issues traditionally considered more suitable for resolution elsewhere. The type of plaintiff involved in these cases also has been changing, and in recent years the state of California has been a defendant in education cases more frequently than ever before. One result of these developments is that the courts have contributed to the centralization of educational policy making in California and aggrieved individuals or groups now look with greater frequency to the state for the redress of rights allegedly violated at the local level.

School officials in California can be sued in either of two systems of courts. Suits involving state laws usually are brought in one of about 80 municipal courts. More important controversies are brought in [illegible] courts, one of which is located in [illegible] counties of the state. Appeal from the decisions of these trial courts can be made to one of five state courts of appeal and from there to the California Supreme Court, the highest court in the state system.

Education suits concerning the U.S. Constitution, federal law, suits where the U.S. government is a defendant, suits between citizens of different states and certain other controversies are brought in federal district courts, one or more of which is located in every state. These district courts are the trial courts in the federal system. Appeals from the decisions of federal district courts go to one of ten courts of appeal. The United States Supreme Court hears appeals from federal courts of appeal and from the individual states' highest courts. A decision of the California Supreme Court involving education, therefore, can be appealed to the U.S. Supreme Court. Most business of the U.S. Supreme Court is discretionary, however, and it hears only a small proportion of the petitions for review which it receives.

The decisions of appellate courts are important to examine for two reasons. First, no data on trial court decisions are available, and in California, only those decisions that are certified by the issuing Court of Appeals for publication are actually released. All California Supreme Court decisions, the court of highest appeal in the state, are published. Second, the decisions of appellate courts are binding on the entire state, whereas the decisions of trial court judges bind only those parties in a particular dispute. Thus, in order to gauge the degree to which the courts shape state educational policy, the decisions of appellate courts are vital.

Every case concerning education in California that was decided between 1858 and 1980 by the California Supreme Court and between 1900 and 1980 by the California Courts of Appeal, those intermediate courts between the trial court and the California Supreme Court, is here analyzed according to the number of cases decided, the issues they raised, and the type of plaintiff who brought the suit. A second set of cases that raised educational issues in which the state or one of its agencies was a defendant is also examined. These cases embrace both state and federal decisions, because the state of California is sued in both jurisdictions. Thus, this set of cases duplicates the first set as it includes all decisions of the California appellate courts. It also includes suits filed and later dropped,

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as well as those resolved by consent decree, that is, by negotiated settlement.

Court Involvement in Educational Policy

During the past century there has been a continuing increase in the number of appellate court cases concerning education in California (see Table 1). One-fourth of the 811 education cases resolved by the California courts since they began hearing such issues were decided in the 68 years from 1858 to 1926. The final one-fourth of cases concerning educational issues was appealed in a mere 10 years, from 1969 - 1979.

The subject matter of appellate court decisions in education increasingly includes issues involving individual or group rights. Since 1960, suits concerning school desegregation, school finance and other rights issues have shown the largest increase of any category of issue argued, including personnel disputes, torts, contracts and property controversies. This attention by the courts to rights issues is significant for several reasons. First, these rights cases often possess potentially far-reaching consequences. They often challenge administrative or political actions concerning the schools such as school disciplinary procedures or state financing arrangements, rather than school-related controversies that are basically rooted in private disputes, such as those concerning contracts. These cases also pose serious problems of fact-finding and of applying traditional legal principles to educational policy. For example, desegregation cases sometimes require the courts to determine the actions and motives of school board members many years in the past. Special education litigation can require the courts to apply traditional legal concepts, such as those of individual rights or due process, to areas usually dominated by educational professionals. How, for example, can the legal requirement that a handicapped child receive an "appropriate education" be satisfied when there is little professional consensus about what constitutes an appropriate educational regime for certain disabilities? This complexity of legal issues raises the probability that judges will make errors at trial, so these cases are much more likely to be appealed than other suits.

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The number of court decisions has increased, the type of plaintiff bringing certain education suits against local school districts has changed. An examination of the plaintiffs involved in cases decided by the appellate courts shows that 557 of 811 cases, or 68.7 percent, were brought by private citizens. Other frequent plaintiffs have been school districts, 16.6 percent, and employee unions, 5.1 percent. The state of California itself was a plaintiff — often suing local school districts — in 29, or 11.7 percent, of all cases. These suits initiated by the state were brought in order to revoke prior state approval of private postsecondary vocational schools (12 cases), and to recover the cost of erroneously purchased surplus property (8 cases). Other cases included those involving the violation of contract by textbook publishers, the violation by school districts of Title I or food services program requirements, the enforcement by the state of the program requirements for special education, and unpaid wages due an employee by a school district.

Organizational plaintiffs are more likely to focus their efforts on educational controversies involving policy or rights issues than are private litigants, and they tend to use class action suits as vehicles for the adjudication of policy issues more frequently than private litigants or school districts. Private organizations such as the American Civil Liberties Union, a legal aid organization, a private antibusing group, and an association of property owners were plaintiffs in 14 of the 811 cases decided by the appellate courts. Eleven of these cases were brought by organizations since 1960.

Many of these private organizations are publicly funded legal centers of advocacy groups that are "repeater" plaintiffs: they have been in court many times on educational rights disputes; they often care more about general policy issues rather than the particular dispute; and they have acquired considerable legal expertise. These repeater organizations select in advance plaintiffs for cases they want to bring in court, and they identify the issues on which they are most likely to obtain a favorable outcome. For example they must decide whether they will challenge merely school assignment policies in desegregation cases or also the curriculum offered in school systems.

These repeater organizations bring lawsuits only when it is apparent that the political and administrative authorities will not correct a wrong on their own. They usually have the money to pay for the lengthy preparation of evidence that must precede the beginning of legal proceedings. These plaintiffs can coordinate a series of cases in order to secure the educational change they want. They also possess the tactical flexibility to seek changes in the rules governing education, thereby increasing chances for later success in court. It may be more important for an organization, for example, that a court define the provision of a certain medical procedure as a "related service", one covered by a consent decree in special education, rather than insure that an individual plaintiff immediately secures that service.

Clearly, the courts now must decide cases brought by new kinds of plaintiffs. The plaintiffs often include groups of parents and their children allied with batteries of attorneys from both private practice and public interest law firms. The lawsuit is commenced only if these plaintiffs are convinced that the political time seems propitious, and sometimes only if a sympathetic judge is assigned to the case. Litigation, therefore, becomes a complex political strategy used by groups to secure educational preferences.

The State as Defendant

Another measure of the court's increased activity in education is the filing of suits against the state; a plaintiff, in essence, uses the courts to alter state education policy or seeks to compel it to force school districts to live up to their legal obligations. Here, too, the growing role of law and the courts is evident. Eighty-five of the 247 cases filed against the California Department of Education, the California Board of Education and the California Superintendent of Public Instruction were filed during the six year period 1968-1974 (see Table 2). An equal number were filed in only two years, 1978-1980. In 1969, California was sued only four times — an average of once every three months. By contrast, in 1980 the state was sued 36 times — an average of once every 1.4 weeks. This was an increase of more than 1200 percent in only slightly more than a single decade! This increased rate assumes even greater significance if the 37 cases involving the revocation of teaching credentials by the state of California are excluded, leaving 210 other suits filed against the state between 1968-1980. Three-fourths of those cases were filed after 1973. And in 1981 the California Board of Education was a named defendant in 108 pending lawsuits.

The subject matter of litigation against the state reflects the wide variety of educational concerns that attend the operation of a modern state education system. Since 1978 there has been a rapid growth in the number of lawsuits pertaining to special education, school program matters, school finance, and other constitutional issues. Over two-thirds of all lawsuits against the

Table 1

Suits Involving Rights and Labor Issues in California[1]

Year	School Finance	School Desegregation	Student Rights	School Labor Relations	School Governance Powers	Others[2] (% of total)	TOTAL (by decade)
1858-69	1	0	0	0	0	3 (66.7)	3
1870-79	0	1	0	0	0	2 (66.7)	3
1880-89	0	1	0	0	1	11 (84.6)	13
1890-99	0	1	0	0	4	39 (88.6)	44
1900-09	4	0	0	0	1	44 (89.8)	49
1910-19	0	0	2	0	3	43 (89.6)	48
1920-29	0	1	3	0	3	71 (91.0)	78
1930-39	1	0	2	0	0	137 (97.9)	140
1940-49	0	0	1	0	0	67 (98.5)	68
1950-59	0	0	1	0	1	80 (97.6)	82
1960-69	2	1	6	3	1	93 (87.7)	106
1970-79	3	4	12	11	1	146 (82.5)	177
Total (By issue)	11	9	27	14	15	735 (90.6)	811

[1] Data between 1858 — 1899 include only decisions of California Supreme Court. Data from 1900 — 1979 include decisions of California Supreme Court and state courts of appeal.

[2] Includes: Administration, teacher credentials, school elections, bonds, tax computation and liability, textbook, education programs, torts, contracts, organization, property and other miscellaneous cases.

state of California concerning special education have been filed since 1978, and more than half of the other cases involving educational programs also have been filed since that year. More than 80 percent of all school finance cases have been filed since 1979, and almost half of the other cases raising constitutional questions have been filed since that year. The concerns of the courts in education cases, therefore, are increasingly likely to focus on concerns that traditionally have been considered matters for policymakers, educators or school administrators. As the role of the courts has expanded, therefore, the role of education professionals and administrators necessarily has been reduced.

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The type of plaintiff bringing suit against the state of California also has changed in the past decade. The largest single group of plaintiffs against the state are private litigants represented by private attorneys. This group accounts for one-third of the cases naming the state as a defendant. The next largest group of cases, 12.4 percent, was brought by publicly-funded legal organizations. Private legal organizations were plaintiffs in 22 of the cases, or 8.9 percent, brought against the state of California during 1968-1980. These private organizations included the NAACP (3 cases), an association for retarded persons (2 cases), the American Civil Liberties Union, and an assortment of other private advocacy groups. Lawsuits filed against the state of California by public organizational plaintiffs have constituted over 22 percent of all education suits against the state since 1968.

Although the state of California and organizational plaintiffs such as the NAACP have acquired acumen in educational litigation, organizational plaintiffs have a considerable advantage over the state in one very important way: they can choose to pursue only certain kinds of issues — generally those educational rights issues that have been brought in significant numbers before the courts only recently. These organizations draw upon experience derived from many similar suits in other jurisdictions. The state's ability to defend itself is weakened by the structural division between the attorney general's office and the office of the legal counsel for the state department of education. Given the complexities of policymaking and the state's supervisory responsibility for the conduct of local school districts, it is also easy for plaintiffs to point at some area where the state has not lived up to its legal obligations. In situations where the state is obligated to change the behavior of local school districts, a suit may force the state to take action before it feels that it would be prudent to do so.

Entangling the state as a defendant in educational litigation is also tactically prudent for organizational plaintiffs. Significant change often can be best achieved if the state, acting as supervisor over individual school districts, is ordered by a court to enforce certain legal or constitutional minima. Suing individual school districts requires more time and money than an organizational plaintiff may possess and raises the possibility that different courts will decide the same fundamental educational questions differently. Making the state enforce the law against local districts promises a plaintiff the greatest potential for effecting widespread reform.

Policy Implications

The courts have been major actors in a variety of social policy issues in the past generation: in civil rights, in prison reform, in the reform of mental institutions, and in enlarging access to the political process. In education the courts have had significant impact on the substance of educational policy, on the process of policymaking, and on the politics of education. Increased court involvement has expanded the educational agenda. Minority groups whose interests traditionally have been ignored by educational policymakers — the

handicapped, and certain racial and ethnic minorities for example — have had their educational preferences declared legal or constitutional "rights" that government cannot ignore. Teacher certification, vocational education, attendance, accreditation and financial records are typically the areas with the highest levels of state control around the country. What is significant about the recent growth in legalization is that the involvement of the courts has occurred in areas that are not traditional loci of state control such as individual rights and desegregation.

An active court role also shapes the process of educational policymaking. Due process hearings, compliance reports and other legal devices have been used by the court to circumscribe the discretion historically possessed by professionals in education. Participatory mechanisms — parent advisory councils and the like — have been established by the courts to give access to the traditionally powerless in educational policymaking. Courts sometimes have undertaken prolonged oversight of educational agencies in order to insure that educational rights have been achieved. This has made them important participants in policymaking.

The courts and organizational plaintiffs have become significant political actors in educational policy. Organizational plaintiffs bargain with the defendant state agencies and judges over the content of remedial plans. Sometimes they assist the courts with the implementation of these plans. They form alliances with state educational bureaucrats and pressure state legislators on certain issues.

The courts help groups to bypass the political bargaining associated with the politics of education in local school districts. Many minority interest groups will gravitate to the judge rather than the local school district in order to achieve policy goals. This form of judicial politics also has had broader political consequences. The federal government sometimes has acted to satisfy the demands of minority group members after they have received an initial declaration of educational rights from the courts.

Yet many educators have complained loudly about the involvement of the courts in the schools. They claim that this is an unwarranted intrusion on their legitimate authority and is the result of the natural dissatisfaction always voiced by political "losers" who have gained a favorable decision from the courts. In part such complaints are justified, for there exist some fairly predictable problems associated with court participation in educational policymaking.

, the expansion of the public agenda from court impetus may result in the overextension of government's responsibility. Court declarations of educational rights require the state's fiscal resources and political commitment to achieve them, as well as the availablity of a useful educational technology. In an era of diminishing fiscal revenues for all levels of government, legislators must make difficult choices from among competing claims on the same public purse. The existence of legal rights declared by courts, without adequate funding to actualize those rights, may make a mockery of the court's involvement in education.

Courts are also inclined to give little weight to consideration of program costs or practicality when participating in educational policymaking, nor are they likely to weigh competing public policy values. Legal and constitutional rights are supposed to exist regardless of considerations of cost or practicality. This complicates the job of state educational administrators, who necessarily must take into account these factors.

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What scholars have found to be true of state agencies generally — that they not only try to solve existing problems, they try to identify new ones — is also true of the courts. Once a court has attempted to solve an educational problem such as handicapped education, it is perceived by citizens as a forum where new grievances can be taken. Parents of the handicapped children in Philadelphia have complained to a federal judge about the poor bus service their children are receiving, even though bus service is unrelated to the original purpose for court oversight of special education in that city.

Finally, court participation in educational policymaking has caused considerable administrative chaos. The court becomes one more center of authority in a system already subject to overlapping sources of authority and rules. Court orders take much time, expense and labor to implement and may result in administrative confusion and disorder. It is one thing for courts to mandate how things ought to be. It is quite another for education officials to achieve them in actual practice. All too often judges and the plaintiff attorneys ignore these complexities.

Defending State Interests

The participation of the courts at the state level makes it difficult to defend the legal interests of the state. A legal defense not only must take into consideration questions of the state's legal duty and responsibility. Educational philosophies, purposes and programs must also be appraised in light of their local implications. If a teacher is fired and the teacher appeals the dismissal to the courts, the task of the attorney for the district is relatively simple: defend the dismissal. When, by contrast, an attack is made on educational practices — for example, the reliance on standardized intelligence tests to identify schoolchildren for placement in programs for the retarded — the state's task is more complex. To win a lawsuit is not enough; a position consistent with the state's general educational policies also must be articulated.

This need to link legal tactics to general educational goals is difficult to achieve. The educational decisionmaker involved in these suits is usually a board of education, not an individual policymaker, but even a single individual has difficulty reconciling the various political, fiscal, educational, and other considerations that a lawsuit entails. The problem is compounded when the defendant is the ten-member California Board of Education. Stances in lawsuits are determined by a six-member majority of the board, and members may vote the same way on a specific question for different reasons. Problems attributable to the instability of the board's position are compounded by the need of the state to coordinate its position with that of local school boards, who also must reconcile competing fiscal, political, and educational concerns. Both the state board of education and local boards are composed of laypersons who are neither legal experts nor often experienced educational policymakers.

School board members also lack the time to involve themselves in the details of educational lawsuits. Board members pay little attention to lawsuits that affect educational policy until crises arise, problems develop, or the state counsel informs the board that an issue must be considered. When board members are unable to articulate legal positions to meet these crises, as often happens, there is an inevitable result: the lawyers representing the state decide on a legal position for the state quite independently of the state board of education.

The state faces a number of other problems in defending itself in court. Proposed legal positions taken by the board of education usually are discussed and decided in executive sessions which are closed to the public. Thus, much of the public comment that helps a lay board take policy positions is absent. The state board of education, as a defendant in a case in which a plaintiff raises specific issues, also has to be specific in its response to the legal allegations made. It is difficult enough to obtain the consensus of state board members on a general education question; it is more difficult yet when the board must reach a consensus on the meaning of certain laws or regulations under legal attack. As educational policymaking is centralized at the state level, scrutiny of prior state educational decisions by "repeater" law firms increases. The state becomes the target of those seeking educational change even when it may have no position on an issue, since it is easier to determine whether a single state board of education has violated the law than it is to determine whether California's 1043 local school boards have violated the law.

Some consideration must be given to whether some lawsuits ought to be defended at all. In California the attorney general automatically assumes that when a party sues the state, it must be defended — even when the members of the state board of education do not wish to make a legal defense. The current State Superintendent of Public Instruction in California, Wilson Riles, has expressed from time to time a desire to keep the state's lawyers entirely out of some educational disputes.

The provision of legal services to state educational policymakers in California is also ineffective. In state government, legal responsibilities typically are divided between a "house" counsel for the state board of education and the state attorney general. Positions on legal disputes are formulated by the state board of education with the assistance of the attorneys employed by the state education department — in itself an occasional source of legal conflict. These attorneys assist the state board in analyzing proposed statutes, writing regulations, deciding various legal policy questions, and in formulating legal strategy. However, when cases are filed, the state board of education is represented by a deputy attorney general who has not participated in formulating the policy under legal challenge and who only occasionally handles education litigation.

This division of legal responsibility causes two difficulties. The deputy attorney general assigned to the case is [illegible] expert in educational policy and almost never has a detailed grasp of the nuances of the policy being litigated. Generally, the deputy who handles the case does so along with literally dozens of other pending lawsuits involving noneducational issues. No one keeps track of the progress of the cases as they move toward resolution in the court, either by watching trends as they develop or by assessing their possible policy impact. Sometimes the need for intensive, expert legal counsel is strong enough to require that outside lawyers be hired to assist in the state's defense. Since the board of education meets only once a month, decisions on legal strategy and tactics must be hurriedly made, often without sufficient attention to the details of a legal dispute.

Table 2
Education Suits Against the State of California Have Increased

Year	*Number of Suits*
1968	4
1969	6
1970	19
1971	14
1972	24
1973	18
1974	13
1975	14
1976	20
1977	16
1978	21
1979	29
1980	36
Unknown	13
TOTAL	247

More importantly, the state attorney general is a constitutional officer independent of the state board of education. The lawyers assigned to attend to the legal needs of the state board of education owe their allegiance to the attorney general, not to the state board of education. Thus, the attorney general has taken the position that his responsibility to the people of the state transcends his allegiance to a particular client — even if that client is an important state agency. For this reason, the attorney general's office almost always has refused to act as co-counsel with the lawyers for the state department of education, insisting that only the attorney general's office has the right to manage litigation in which that office participates. This attitude may be appropriate when the issues are primarily legal. It is more difficult to support when the issues at stake have significant educational or political consequences.

Many cases filed against the state are not tried but rather are settled by negotiation and stipulation. For example, the famous case of *Pennsylvania Association of Retarded Children v. Commonwealth of Pennsylvania (1971)* was instrumental in establishing that retarded children have a constitutional right to an appropriate education. It was settled by a consent decree entered by the court after all the parties to the suit negotiated the terms of a settlement. These negotiated settlements in educational litigation, while often valuable, place a burdensome responsibility on the state defendants because such settlements often specify what the parties to the suit think the law ought to be, and they disregard the feasibility of putting the settlement into effect.

Formulating educational policy by consent decree causes more problems than does formulating educational policy through reliance on lawsuits that are settled by full trial, judgment and sometimes appeal. Settlement negotiations are conducted in private. The public discussion and testimony that accompanies the formulation of educational policy by the state legislature or by the state board of education is absent. Not only are the negotiations on the terms of the consent decree kept secret, but also the debate by the state board on whether to approve the decree's final form usually takes place in closed executive session; it is protected by the attorney-client privilege. Even the state board does not participate in negotiations on the terms of the consent decree, which are conducted by an attorney. The entire state board of education is thus isolated from the bargaining that is supposedly taking place on its behalf. The attorney conducting such negotiations must in turn be well-versed in educational policy. This familiarity is difficult to acquire when the counsel for the state board and the attorney general have different responsibilities and work in different offices. The deputy attorney general working on educational litigation almost never has a true "feel" for the positions of the state board members.

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Use of consent decrees also prevents an assessment by public officials of the costs of alternative proposed settlements. Political and social costs must be weighed, as well as legal requirements set. This balancing can be accomplished only when negotiations are carried out in public, when competing political constituencies are alerted to the details of proposed settlements, and when the attorneys working on behalf of the interests of the state are made aware of all relevant policy implications of a proposed course of action.

The growth in the number of cases challenging the education programs of local school districts ought to be accompanied by a greater coordination between the state and local school districts in shaping a coherent legal strategy. The state's formulation of its legal position in a controversy — what ought to happen — should be consistent with the school district's view of what is possible. It is rarely consistent at this time.

Conclusion

The complaints of school administrators — at least in California — are correct. The courts now play a role in state educational policymaking and they are now important actors in the politics of education. The courts have complicated the lives of educational administrators by constraining school systems with rules and law-like mechanisms that seek to insure greater equity and accountability.

The importance of the courts in education may soon increase. The Reagan Administration's New Federalism upsets many of the old patterns of educational finance and governance. The trend toward more detailed federal rules and closer federal scrutiny has been reversed. There is consequently more room for discretion at the state and local levels as federal programs have become fewer in number and less rigid in their requirements.

The efforts to dismantle a federal statutory and regulatory apparatus that has granted rights to particular minority groups may lead those groups to go to the courts to reestablish their entitlement to what they regard as equitable treatment. It bears recalling that, in most instances, federal legislative and administrative intervention on behalf of educational have-nots was preceded by court decisions. Those opinions announced in general terms that a particular group had a constitutional entitlement that the political process had ignored, thus giving the limited-English-speaking and women's groups new clout with the Congress. Only then did the legislation expand on the court-created entitlement, turning them into federal programs. If this legislation is repealed or weakened substantially, a return to the judiciary is at least possible. Diminishing the authority of federal judges over education issues — as has been seriously proposed with respect to desegregation — would affect this scenario. Such a policy course would presumably lead advocates to rely more on state rather than federal courts to vindicate their claims.

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Treatment of the handicapped provides an apt illustration. In March 1982, the administration proposed major changes in the law guaranteeing the right of the handicapped to an appropriate education: the impact would be to diminish federal support for that right. In April 1982, the Office of Management and Budget urged that Section 504 of the Rehabilitation Act, which also applies to the education of the handicapped, be rewritten. Under the proposed law, only if the benefits of providing aid to the handicapped exceeded the costs would local agencies have to act, and the determination of how to calculate costs and benefits would be left to local authorities. That provision, if adopted, may effectively nullify federal legislative protection. There is a further, likely chapter in the story: a possible effort on the part of the handicapped to convert the guarantees of the Education for All Handicapped Children Act and Section 504 into constitutionally-backed assurances. How the courts might be anticipated to react and with what impact on the policy goals of the New Federalism is uncertain.

Another possible unanticipated effect of deregulation at the federal level is increased regulation on the part of some states, to pick up the "slack" left by the withdrawal of a federal presence. While at one time Washington's efforts encountered substantial resistance among many states, a more flexible attitude on the part of the Department of Education, coupled with growing appreciation by states and localities for the concerns Washington has espoused, has produced a surprising degree of consensus. Moreover, state education agencies have vastly expanded the scope of their authority, partly because states, not localities, now contribute the largest share of the education dollar, and partly in response to federal initiatives. State agencies may well expand the scope of their activities — at the expense of local initiative. The form of that initiative will be shaped by the courts, which, as we have seen have played a critical role in educational policy in the last two decades. The complaints of state school officials may become louder in the decade to come. ■

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